Federal Court

Cour fédérale

Date: 20140715

Docket: IMM-7956-13

Citation: 2014 FC 704

Ottawa, Ontario, July 15, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

GLEN REGAN ST. JOHN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of K. Roy-Tremblay, a Director of Case Determination at the Case Management Branch of Citizenship and Immigration Canada [the Officer], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Officer refused to exempt the Applicant's permanent residence visa application from the criminal inadmissibility provisions of the Act on humanitarian and compassionate [H&C] grounds, pursuant to subsection 25(1) of the Act.

I. Issues

[2] The issues in the present application are as follows:

A. Was the Officer's decision to refuse the Applicant's request for an exemption from inadmissibility on criminal grounds, on the basis of H&C considerations, unreasonable?

B. Did the Officer breach their duty of procedural fairness to the Applicant?

II. Background

[3] The Applicant is a citizen of Guyana. In February, 1989, he moved from Guyana to the United States. On July 15, 1992, he received a cumulative sentence of six years imprisonment from the United States District Court for the Western District of North Carolina. This sentence was based on eight counts on three charges:

i. Conspiracy to possess with intent to distribute in excess of 50 grams of cocaine base and cocaine (USC 21 § 846);

ii. Use, carry firearm during drug trafficking crime and aiding and abetting same (USC 18 § 924(c)(1), (2)); and

iii. Possess with intent to distribute cocaine base and aiding and abetting in same (USC 21 § 841(a)(1)).

[4] After his release, the Applicant returned to Guyana. The Applicant then entered Canada in December, 1998, and again in March, 2001. The Applicant married Michelle Dianne St. John, a citizen of Canada, on October 20, 2001.

[5] On May 2, 2002, the Applicant applied for refugee protection in Canada. His claim was rejected on October 29, 2003. On April 4, 2006, the Applicant was informed by the Ministry of Citizenship and Immigration [the Minister] that he met the eligibility requirements to apply for permanent residency as a member of the Spouse or Common Law in Canada class. The Applicant and his representatives made several requests for updates on the status of his file for the next several years.

[6] On February 22, 2010, the Applicant wrote to the Minister, acknowledging that his criminal convictions in the United States rendered him inadmissible for permanent residency owing to the criminal inadmissibility provisions in 36(1)(b) of the Act. The Applicant also acknowledged that he was ineligible to apply for rehabilitation of his inadmissibility as per 18(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. The Applicant asked for an H&C exemption from his criminal inadmissibility, on the grounds of hardship to the Applicant, his wife and her child, and the Applicant's efforts to lead a constructive life in Canada, pursuant to 25(1) of the Act [the H&C Application].

[7] On or around May 23, 2013, Christina Iafrate, a Supervisor at the Canadian Immigration Centre in Etobicoke, advised the Applicant's representative to submit a criminal rehabilitation application [the Rehabilitation Application]. At that time, the Applicant was represented by Cindy Ramkissoon-Shears, an immigration consultant. According to her affidavit, Ms. Ramkissoon-Shears informed Ms. Iafrate of her belief that the Applicant was ineligible for rehabilitation given the nature of his convictions.

[8] In a facsimile dated June 18, 2013, the Minister informed the Applicant that in assessing his H&C Application, it had developed concerns about the Applicant's known aliases, his place and date of birth, and his legal name. The Minister requested that the Applicant submit several legal documents, including police clearances and fingerprints, to confirm the Applicant's identity and criminal record history. The Minister also reiterated its belief that the Applicant should submit a Rehabilitation Application.

[9] According to her affidavit, Ms. Ramkissoon-Shears contacted Ms. Iafrate following the receipt of the June 18, 2013, request to seek clarification on what should be submitted to the Minister. She was informed by Ms. Iafrate that it was unnecessary to provide the information requested by the Minister on June 18, 2013, if the Applicant submitted a Rehabilitation Application:

> 13…I contacted Officer Iafrate at Etobicoke CIC, informing her of this request and if it is necessary to respond, as a Criminal Rehabilitation application was being prepared for submittal.
>
> 14. Further it was discussed with [sic] Officer that some of the requests made in the letter dated June 8, 2013 was unreasonable, as it was suggested for Mr. St. John to obtain fingerprints and police clearances under his alias names and within his FBI Clearance this information was already available.
>
> 15. Officer Iafrate instructed to continue with submitting the Criminal Rehabilitation application and "not to worry" about the follow up for the Waiver.

[10] In her affidavit, Ms. Iafrate disputes this characterization of her conversation with Ms. Ramkissoon-Shears:

> 8…While I do not remember the specifics of my conversation that took place on or about June 17, 2013, based on my usual practice it seems highly unlikely that I would advise an applicant to ignore a

> request for further information from another decision-maker. While I may have discussed the benefit of filing an additional application for criminal rehabilitation, I truly doubt that I would have advised Cindy Ramkissoon-Shears to ignore the decision-maker's request for additional information.

[11] The Applicant never provided the information requested by the Minister on June 18, 2013, but submitted a Rehabilitation Application on June 26, 2013.

[12] On November 20, 2013, the Officer denied the Applicant's H&C Application.

[13] On November 22, 2013, Ms. Ramkissoon-Shears contacted Ms. Iafrate to inquire why a decision on the Rehabilitation Application had not been made. Subsequent to this inquiry, Ms. Iafrate discovered that there had been an internal filing error with respect to the Rehabilitation Application, which had delayed its review.

[14] On November 25, 2013, Ms. Iafrate wrote to the Applicant, stating that notwithstanding the denial of the Applicant's H&C Application, the Minister would consider the Applicant's Rehabilitation Application, and re-consider the Applicant's H&C Application should his Rehabilitation Application be successful.

[15] On February 4, 2014, the Minister informed the Applicant that his Rehabilitation Application was denied.

[16] The primary basis for the Officer's refusal of the Applicant's H&C Application was that the Applicant did not respond to the Minister's request of June 18, 2013.

[17] The Officer noted the Applicant's conviction on six counts of possessing with intent to distribute cocaine pursuant to USC 21 § 846. The Officer found that this offence was equivalent to the trafficking offence described in subsection 5(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [Controlled Drugs and Substances Act] in Canada, an offence which is punishable by imprisonment to life. As a result, the Officer confirmed that the Applicant was inadmissible pursuant to 36(1)(b) of the Act and not eligible for rehabilitation pursuant to 18(2) of the Act.

[18] The Officer considered that the Applicant is married and has a stepdaughter and grandchild in Canada. The Officer acknowledged that the Applicant and his wife rely on each other for emotional support and that the Applicant's wife relies on the Applicant for financial support. However, the Officer concluded that there was insufficient evidence to suggest that the Applicant's stepdaughter is dependent on the Applicant financially and that her best interests would suffer if he was removed from Canada.

[19] The Officer determined that the Applicant is somewhat established in Canada. In support of this finding, the Officer noted that the Applicant coaches youth soccer, is currently unemployed due to a knee injury caused by a workplace accident, and has received letters of support from colleagues and friends. These letters attest to his good character, remorse over his criminal convictions, and positive involvement in the community.

[20] Notwithstanding the factors indicating his positive establishment in Canada, the Officer concluded that the Applicant's convictions in the United States were of a serious nature. Further,

the Officer was not convinced of the Applicant's identity or that he had no further criminal convictions, as there were discrepancies in the documents provided by the Applicant. These included two documented places of birth and nine known aliases. These concerns were communicated to the Applicant by the Minister on June 18, 2013, but no response was received. With respect to this evidence, the Officer concluded:

> The information required is essential for me in order to make an informed decision. Without that information, I am unable to confirm Mr. St. John [sic] identity and I am unable to verify that he has not reoffended…Despite some positive factors in favor of Mr. St. John [sic] request for an exemption of his serious criminal inadmissibility, I am not satisfied that Mr. St. John has not reoffended and that he is not inadmissible on other grounds.

III. Standard of Review

[21] The standard of review for findings of fact is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9), and correctness for issues of procedural fairness (*Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 855, at para 24).

IV. Analysis

[22] Excerpts of the relevant legislation are attached as Appendix A.

A. *Was the Officer's Decision to Refuse the Applicant's Request for an Exemption from Inadmissibility on Criminal Grounds, on the Basis of H&C Considerations, Unreasonable?*

[23] The Applicant argues that the Officer unreasonably equated the Applicant's convictions for possession with intent to distribute cocaine pursuant to USC 21 § 846 with the trafficking

offence described in subsection 5(1) of the Controlled Drugs and Substances Act, when it should have been equated with the possession for purposes of trafficking offence in subsection 5(2). While the Applicant claims the crimes are conceptually distinct he acknowledges that a conviction for either would render the Applicant inadmissible.

[24] The Applicant also disagrees with the Officer's conclusions as to the hardship that would be suffered by the Applicant's step-daughter and his wife if the H&C Application was not granted, as the Applicant contends he is an active participant in their lives.

[25] With regard to the adequacy of reasons, the Applicant argues that given the evidence of the Applicant's identity before the Officer, it is unclear why the Applicant's H&C Application was denied (*Bustamante v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1198, at para 35)

[26] The reasons are adequate, as they demonstrate why the Officer made their decision and allow me to determine whether it is within the range of possible, acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 21-22). The reasons demonstrate that the Officer was concerned about the unresolved issues regarding the Applicant's identity and criminal history and that the Officer decided primarily on this basis.

[27] The Officer's decision turned on their outstanding concerns about the Applicant's identity and criminal history since his convictions in the 1990s. The Applicant did not respond to

the request for information made by the Minister on June 18, 2013. Given that the requested information was central to the H&C Application, the Officer's decision was reasonable.

[28] The Applicant's other arguments relate to issues that are not determinative of this application, and amount to an attempt to re-weigh the evidence.

[29] Further, the Applicant does not establish that the Officer's erroneous citation of subsection 5(1) of the Controlled Drugs and Substances Act had any meaningful impact on the Officer's decision, as a conviction under either 5(1) or 5(2) would result in criminal admissibility, and both are reflective of the Officer's stated concern of the seriousness of drug-related crime. The Applicant's arguments regarding financial dependency and the failure to properly consider the Applicant's relationship with his family amount to a disagreement with the conclusions drawn by the Officer (*Gazlat v Canada (Minister of Citizenship and Immigration)*, 2008 FC 532, at para 25).

B. *Did the Officer Breach their Duty of Procedural Fairness to the Applicant?*

[30] The Applicant argues that his representatives diligently pursued his claims, and both the Applicant and Ms. Ramkissoon-Shears have sworn affidavits stating that Ms. Iafrate told the Applicant he did not need to comply with the request of June 18, 2013. Given that the Officer decided his H&C Application on the basis that the documents requested on June 18, 2013, were not submitted, the Officer breached their duty of procedural fairness to the Applicant (*Zhu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 155, at paras 34-35; *Benitez v*

Canada (Minister of Citizenship and Immigration), 2006 FC 461; *Sketchley v Canada (Attorney General)*, 2005 FCA 404).

[31] In his Reply Memorandum, the Applicant argues that it is irrelevant that the Minister agreed to re-open the H&C Application in the event that the Applicant's Rehabilitation Application was successful, as it does not rectify the procedural unfairness described above. The Applicant also notes that Ms. Iafrate's affidavit does not deny that she told Ms. Ramkissoon-Shears that the Applicant was not required to submit a response to the June 18, 2013, request.

[32] The Respondent notes that the Minister encouraged the Applicant to submit his Rehabilitation Application and would have re-opened the Applicant's H&C Application if the Applicant's Rehabilitation Application had been successful. The Respondent argues that this is indicative of procedural fairness. Further, Ms. Iafrate's affidavit demonstrates that she did not tell Ms. Ramkissoon-Shears to ignore the request made by the Minister on June 18, 2013. Accordingly, there can be no breach of procedural fairness.

[33] The Applicant is correct that if he was instructed not to submit a response to the June 18, 2013, request, there was a breach of procedural fairness, as his H&C Application was decided largely on the basis of his failure to respond to that request (*Zhu*, at paras 34-35). The affidavits of Ms. Iafrate and Ms. Ramkissoon-Shears dispute whether this occurred, but I accept Ms. Ramkissoon-Shears version of events. Being unresponsive without a reason does not fit with the course of conduct demonstrated by the Applicant and his representatives, who otherwise demonstrated diligence in pursuing his claims with the Minister.

[34] In contrast, the Minister did not appear to be diligent in many respects – the Applicant's H&C Application took years to process, his Rehabilitation Application was mis-filed, and he was persuaded to apply for rehabilitation by the Minister despite his stated belief that he was ineligible, a belief that seems plainly supported by the legislative requirements in subsection 18(1) of the Act. This conduct shows that the Minister's representatives have not been diligent or organized in relation to the Applicant's file.

[35] Moreover, Ms. Iafrate cannot recall the specifics of the conversation she had with Ms. Ramkissoon-Shears, whereas Ms. Ramkissoon-Shears is unequivocal about what occurred during that conversation. Considering the evidence in its entirety, I am persuaded that Ms. Ramkissoon-Shears' description of events is accurate, and that there was a breach of procedural fairness.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is remitted to a different Officer for reconsideration. The Applicant shall be provided with an opportunity to respond the Minister's request of June 18, 2013.

"Michael D. Manson"
Judge

APPENDIX "A"

***Controlled Drugs and Substances Act*, SC 1996, c 19**

5. (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance. (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.	5. (1) Il est interdit de faire le trafic de toute substance inscrite aux annexes I, II, III ou IV ou de toute substance présentée ou tenue pour telle par le trafiquant. (2) Il est interdit d'avoir en sa possession, en vue d'en faire le trafic, toute substance inscrite aux annexes I, II, III ou IV.

***Immigration and Refugee Protection Act*, SC 2001, c 27**

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. 36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché. 36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants : a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale

Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(…)

(3) The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(…)

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

***Immigration and Refugee Protection Regulations,* SOR/2002-227**

17. For the purposes of paragraph 36(3)(c) of the Act, the prescribed period is five years

17. Pour l'application de l'alinéa 36(3)c) de la Loi, le délai réglementaire est de cinq ans à compter :

(a) after the completion of an imposed sentence, in the case of matters referred to in paragraphs 36(1)(b) and (2)(b) of the Act, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*; and	a) dans le cas des faits visés aux alinéas 36(1)b) ou (2)b) de la Loi, du moment où la peine imposée a été purgée, pourvu que la personne n'ait pas été déclarée coupable d'une infraction subséquente autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur les jeunes contrevenants;
(b) after committing an offence, in the case of matters referred to in paragraphs 36(1)(c) and (2)(c) of the Act, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.	b) dans le cas des faits visés aux alinéas 36(1)c) ou (2)c) de la Loi, du moment de la commission de l'infraction, pourvu que la personne n'ait pas été déclarée coupable d'une infraction subséquente autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur les jeunes contrevenants.
18. (1) For the purposes of paragraph 36(3)(c) of the Act, the class of persons deemed to have been rehabilitated is a prescribed class.	18. (1) Pour l'application de l'alinéa 36(3)c) de la Loi, la catégorie des personnes présumées réadaptées est une catégorie réglementaire.
(2) The following persons are members of the class of persons deemed to have been rehabilitated:	(2) Font partie de la catégorie des personnes présumées réadaptées les personnes suivantes :
(a) persons who have been convicted outside Canada of no more than one offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, if all of the following conditions apply, namely,	a) la personne déclarée coupable, à l'extérieur du Canada, d'au plus une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation si les conditions suivantes sont réunies :
(i) the offence is punishable in Canada by a maximum term of imprisonment of less than 10 years,	(i) l'infraction est punissable au Canada d'un emprisonnement maximal de moins de dix ans,
(ii) at least 10 years have elapsed since the day after the completion of the imposed sentence,	(ii) au moins dix ans se sont écoulés depuis le moment où la peine imposée a été purgée,
(iii) the person has not been convicted in Canada of an indictable offence under an Act of Parliament,	(iii) la personne n'a pas été déclarée coupable au Canada d'une infraction à une loi fédérale
(iv) the person has not been	

convicted in Canada of any summary conviction offence within the last 10 years under an Act of Parliament or of more than one summary conviction offence before the last 10 years, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(v) the person has not within the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament, other than an offence designated as a contravention under the Contraventions Act or an offence under the Youth Criminal Justice Act,

(vi) the person has not before the last 10 years been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence under an Act of Parliament, and

(vii) the person has not committed an act described in paragraph 36(2)(c) of the Act;

punissable par mise en accusation,

(iv) elle n'a pas été déclarée coupable au Canada d'une infraction à une loi fédérale punissable par procédure sommaire dans les dix dernières années ou de plus d'une telle infraction avant les dix dernières années, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur le système de justice pénale pour les adolescents,

(v) elle n'a pas, dans les dix dernières années, été déclarée coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale, autre qu'une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ou une infraction à la Loi sur le système de justice pénale pour les adolescents,

(vi) elle n'a pas, avant les dix dernières années, été déclarée coupable, à l'extérieur du Canada, de plus d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par procédure sommaire,

(vii) elle n'a pas commis l'infraction visée à l'alinéa 36(2)c) de la Loi;

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Alesha A. Green	FOR THE APPLICANT, GLEN REGAN ST. JOHN
Alison Engel-Yan	FOR THE RESPONDENT, THE MINISTER OF CITIZENSHIP AND IMMIGRATION

SOLICITORS OF RECORD:

THE LAW OFFICE OF ALESHA A. GREEN Barrister & Solicitor Toronto, ON	FOR THE APPLICANT, GLEN REGAN ST. JOHN
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT, THE MINISTER OF CITIZENSHIP AND IMMIGRATION